Supreme Court, U. S.
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No. 95-108

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JON B. LINDEMAN,

Petitioner,

v.

CITY OF MIAMI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS PROTECTS A GOVERNMENT EMPLOYEE WITH A STATE CREATED PROPERTY INTEREST IN EMPLOYMENT FROM TERMINATION FOR ANY REASON OTHER THAN FOR CAUSE WHERE THE EMPLOYEE WAS AFFORDED NOTICE, A HEARING, AND JUDICIAL REVIEW IN STATE COURT.[1]

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[1] Respondent restated the question presented for review to state the issue more precisely.

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STATEMENT IN OPPOSITION TO JURISDICTION

Petitioner asserts that 28 U.S.C. Section 1254(1) serves as the statutory basis for the Court "to review the judgment in question by writ of certiorari...." Petition at 2. However, this provision merely delineates methods of review, as opposed to confer jurisdiction for review.

A review on writ of certiorari is a matter of sound judicial discretion, not as of right. Sup. Ct. R 10.1. Petitioner contends that certiorari should be granted because the decision rendered by the Eleventh Circuit Court of Appeals "conflicts" with decisions of this Court and other United States courts of appeals, and involves "important questions of law."

Petitioner's position is without merit. The Eleventh Circuit's panel "decision" consisted of two sentences:

> Appellant's motion for summary reversal is GRANTED. This matter is REMANDED to the district court for the entry of a judgment consistent with *McKinney v. Pate*, 20 F. 3d 1550 (11th Cir.), *cert. den.* ___ U.S. ____, 115 S. Ct. 898, 899, 130 L.Ed.2d 783 (1995). [Petitioner's Appendix B].

The district court has not entered a judgment or otherwise taken any action on remand. Rather, the only final judgment entered in this case, that is, the final judgment that served as the impetus for Respondent taking the appeal to the Eleventh Circuit, was in Petitioner's favor. Therefore, it is difficult to conceive how the Eleventh Circuit's two sentence decision (or the final judgment in Petitioner's favor in the district court that presently stands reversed) "conflicts" with any opinion

issued by either this Court or any United States court of appeals. It is similarly inconceivable how the Eleventh Circuit's two-sentence decision involves an "important question of law" demanding this Court's resolution. Petitioner's motive in this case is quite transparent. That is, Petitioner uses this case as the vehicle to assail the Eleventh Circuit's en banc decision in *McKinney v. Pate*, 20 F. 3d at 1550, notwithstanding this Court's previous refusal to do so. See ___ U.S. ____, 115 S. Ct. 898, 899, 130 L.Ed.2d 783 (1995). The jurisdictional impediment enables this Court to dismiss the Petition without passing on the arguments raised therein.

STATEMENT OF THE CASE

The brief in opposition to a petition for writ of certiorari "should address any perceived misstatements of fact...." S.Ct.R. 15.1. While Petitioner's statement of the case is generally accurate, the problem is more with what was not stated, as opposed to what was stated.

Petitioner neglected to mention that although he was laid off from his job as of May 23, 1988, his name was placed on a lay-off register. While he was on the eligible register, Respondent located a job for him in the City's Parks and Recreation Department. He returned to work on October 24, 1988 in that department as a Principal Staff Analyst, and continued his employment with the City until he accepted a retirement incentive in 1994.

At the outset, it is important to recognize that the state and federal proceedings are separate and distinct. In the state proceeding, Petitioner exercised the procedures that are

accorded him under the City of Miami Civil Service Rules and state law to challenge the wrongful layoff.

City of Miami Civil Service Rule 14.3 authorizes any "employee in the classified service with permanent Civil Service status, who has been suspended, reduced in rank, or dismissed" to challenge said action by way of an "appeal" to the Civil Service Board. In addition, City of Miami Civil Service Rule 16.2 entitles an employee who has been "aggrieved by reason of what he/she considers to be a violation of the Civil Service rules to his/her detriment" to a hearing before the Civil Service Board. After the hearing accorded under either of the aforementioned Civil Service rules, the Civil Service Board makes findings and recommendations to the City Manager. Thereafter, the City Manager may then sustain, reverse, or modify the action, or direct an appropriate remedy where necessary. The employee may then file a petition for writ of common law certiorari in the Dade County Circuit Court seeking to quash the City Manager's decision if said employee is not satisfied with the City Manager's determination.

That is precisely the procedure Petitioner followed in the state proceeding. Petitioner requested, and was given, a hearing before the Civil Service Board. The Civil Service Board agreed with Petitioner that the Civil Service rules had been violated, and recommended that he receive back pay, that the appropriate adjustment be made to his past and present salary and pension plan, that the appropriate adjustment be made to his title, and that he should otherwise be made whole as a result of the wrongful layoff.

The City Manager rejected the Civil Service Board's findings and recommendations and entered a judgment

accordingly. Petitioner then filed a petition for common law certiorari in Dade County Circuit Court, where the matter was briefed and argued orally. A three-judge panel agreed with Petitioner, quashed the judgment entered by the City Manager, and ordered Respondent to follow the Civil Service Board's findings and recommendations. Respondent complied.

The state action vis-a-vis the hearing authorized by the Civil Service rules and the certiorari proceeding in Circuit Court dealt with a single narrow issue: whether the manner in which Petitioner was laid off violated the Civil Services rules. The state proceeding encompassed no other substantive claim. Rather, Petitioner availed himself of all the procedural process accorded under state law and prevailed. As a result of the state proceeding, Petitioner received back pay, adjustments to his past and present salary and pension, adjustment to his title, and was otherwise made whole as a result of the wrongful layoff.

Petitioner filed the instant case in the United States District Court for the Southern District of Florida before the state proceedings concluded. In the complaint, Petitioner asserted that Respondent deprived him of property without due process of law by virtue of his wrongful layoff and sought relief for the violation of his civil rights under 42 U.S.C. Section 1983. Petitioner did not allege a violation of any other constitutional right.

The district court recognized early on that, despite Petitioner's nebulous pleading as to whether his claim encompassed both procedural and substantive due process, there was no viable procedural due process claim. In an order on Respondent's motion for summary judgment entered

on May 20, 1992, the district court found that Petitioner took advantage of procedures to have an employment decision reviewed, and the state court ruled in his favor. The district court granted the City's motion for summary judgment "as it relates to a violation of Lindeman's right to procedural due process" because Petitioner had been "afforded the opportunity to contest the wrongful layoff and has received, or will receive, compensation sufficient to make him whole," but denied the motion as it related to substantive due process. This ruling left substantive due process as the sole claim to be tried.

The substantive due process violation was tried non-jury in January, 1993. The district court determined that final judgment should be entered in favor of Petitioner in its memorandum opinion and order issued July 14, 1993. On the same day, the district court entered final judgment for Petitioner in the amount of $25,000 for compensatory damages, and $7,370.50 for lost vacation and sick pay. The district court denied all the post-trial motions filed by both parties and awarded Petitioner attorney's fees in the amount of $76,230.

Respondent timely appealed both the final judgment and the attorney's fee award. Petitioner filed a notice of cross appeal in regard to the final judgment. Respondent filed a motion to stay the appellate proceedings pending this Court's resolution of a petition for writ of certiorari filed in *McKinney v. Osceola County Board of County Commissioners*, Case No. 94-568,[2] which the Court of Appeals granted. This Court denied the petition for writ of certiorari in *McKinney* on January 17, 1995. In an effort to avoid unnecessary judicial labor and the expense of briefing the case, the City thereafter filed in the Court of Appeals a motion for summary reversal of final judgment on appeal. Respondent premised

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2 *McKinney v. Pate*, 20 F. 3d 1550 (11th Cir. 1994)(en banc).

its motion on the fact that the Court of Appeals' *en banc* decision in *McKinney* was dispositive. A panel of circuit judges unanimously granted the City's motion by an order issued on April 10, 1995, the substance of which has already been quoted above verbatim.

Petitioner thereafter filed the instant petition for writ of certiorari. The district court has not taken any action on remand as of the time of filing this response in opposition to the petition for writ of certiorari.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

The substantive component of the Due Process Clause protects fundamental rights, that is, those that are created by the Constitution, and certain other rights such as the right of privacy. *Planned Parenthood v. Casey*, ____ U.S. ____, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Palko v. Connecticut*, 302 U.S. 319 (1937). "The history of substantive due process 'counsels caution and restraint.' " *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985), (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)). In fact, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

The Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 195

(1989). Otherwise stated, "[i]ts purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. Tort and employment law, areas in which substantive rights are created by virtue of state law, remain outside the scope of the scope of substantive due process jurisprudence. *Daniels v. Williams*, 474 U.S. 327 (1986); *Bishop v. Wood*, 426 U.S. 341 (1972); *see also McKinney v. Pate*, 20 F. 3d 1550 (11th Cir. 1994)(en banc), *cert. denied*, ___ U.S. ____, 115 S. Ct. 898, 899, 130 L.Ed.2d 783 (1995).

Assuming *arguendo* that the court of appeals' two-sentence summary reversal is a reviewable order, the decision rendered does not, as Petitioner asserts, conflict with any of this Court's decisions. Moreover, the Eleventh Circuit's en banc decision in *McKinney*, the case upon which the court of appeals relied to grant summary reversal in the instant case, is thoroughly consistent with this Court's precedent.

The Petitioner in *McKinney*, like Petitioner herein, was a full-time permanent employee who was terminated by his local government employer. Like Petitioner herein, he was afforded hearings to challenge his termination. Like Petitioner, McKinney filed suit against his former employer wherein he alleged, inter alia, violation of his civil rights under 42 U.S.C. Section 1983. The jury returned a verdict for McKinney on his substantive due process claim, but the district court set aside the jury's verdict and entered judgment for the employer.

The Eleventh Circuit, en banc, held that in non-legislative cases, only procedural due process claims are available to pretextually terminated employees. *McKinney*, 20 F. 3d at 1560. The Court of Appeals opined that

> areas in which substantive rights are created only by state law (as is the case with tort law

> and employment law) are not subject to substantive due process protection because 'substantive due process rights are created only by the Constitution.' [citation omitted].

McKinney, 20 F. 3d at 1556. Thus, clearly the Eleventh Circuit adhered to, and did not depart from, this Court's substantive due process jurisprudence.

The decisions of this Court which Petitioner alleges "conflict" with the "decision" rendered below are inapposite. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), the issue before the Court concerned the constitutionality of an Oklahoma statute that required all state officers and employees to take a loyalty oath within a prescribed period of time. This Court found that the statute offended due process as an assertion of arbitrary power because it indiscriminately classified innocent with knowing activity. That is, it did not matter whether the membership in a proscribed association existed knowingly or innocently. Moreover, the employees in that case were not permanent employees with a vested property right.

Petitioner relies on *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), because a "portion of the *Wieman* decision was quoted with approval...." Petition at 9-10. In *Slochower*, this Court addressed the constitutionality of a provision in the New York City Charter that required an employee to be terminated and banished from holding any other office or employment in the city if an employee invoked the privilege against self-incrimination to avoid answering a question relating to his official conduct. Again, this decision is inapposite because the Court passed on the constitutionality of a provision as applied to a city college professor who was summarily discharged without notice or hearing. Although the provision failed to pass constitutional

muster, this Court observed that "[t]his is not to say that Slochower has a constitutional right to be an associate professor ... The State has broad powers in the selection and discharge of its employees." *Id.* at 559.

Petitioner further relies on *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961) because "the same language [in *Wieman*] was, again, quoted wtih approval...." Petition at 10. As in *Weiman*, this Court passed on the validity of a state statute which required public employees to take a "loyalty oath" or suffer termination. The Court found that the statute was vague, but quoted from one of its earlier cases where it observed that "[i]t is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Cramp*, 368 U.S. at 287 (quoting *Champlin Ref. Co. v. Corporation Com. of Oklahoma*, 286 U.S. 210,243, 52 S.Ct. 559, 76 L.Ed. 1062 (1932).

In *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 81 S.Ct. 174, 6 L.Ed.2d 1230 (1961), this Court addressed whether a short order cook in a cafeteria operated on a military installation was entitled to notice and a hearing before her security badge was revoked. Not only is this case inapposite because the procedural aspect of due process, that is, notice and hearing are not at issue herein, Petitioner's quotation from the decision is misleading due to the fact that it is incomplete. While this Court did recognize that there are some constitutional limitations on state and local government employers' freedom of action that are not visited upon private employers, this Court further observed that such a recognition does not mean that

> all such employees have a constitutional right to notice and a hearing before they can be removed. We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory -- that she could not have been kept out because she was a Democrat or a Methodist.

Id. at 898. Moreover, the Court noted that it has consistently recognized that "the interest of a government employee in retaining his job can be summarily denied." *Id.* at 896.

This Court's analysis in *Harrah Independent School District v. Martin*, 440 U.S. 194 (1979), which involved a tenured teacher who was sanctioned by the school district by refusal to renew her contract, does not compel a contrary result. In that case, the school district conceded that the teacher was tenured under state law; therefore, she could only be dismissed for specified reasons. The court of appeals found that the teacher had a constitutional right to retain her employment as a teacher, and the school district's capricious and arbitrary action violated both due process and equal protection. This Court reversed. It found that the teacher's "claim of a denial of substantive due process under these circumstances is wholly untenable." *Id.* at 199. The Court observed that the interest to which the teacher claimed substantive due process protection did not resemble an individual's freedom of choice in regard to certain basic matters of procreation, marriage and family life. Rather, the teacher merely claimed that she could not be discharged for failure to comply with a continuing-education requirement incorporated into her contract. Although the Court engaged in a substantive due process analysis of sorts, it did not

directly address the issue of substantive due process for state created employment rights.

The opinions of this Court upon which Petitioner relies for asserted "conflict" have no bearing on the decision rendered by the Eleventh Circuit either in the two-sentence summary reversal entered below or in *McKinney*. For the most part, these cases were decided during a time when fear of Communism was rampant, and states enacted laws requiring government employees to render "loyalty oaths" as a "protective measure." On the hand, Respondent relies on the decisions of this Court that supply an analytical framework to reach the determination that state-created employment rights should not be accorded federal substantive due process protection.

Petitioner also asserts that the Court should grant the petition because "[d]ecisions directly opposite to the decision in the present case, and opposite *McKinney v. Pate, supra,* were rendered" by various circuit courts of appeals.. Petition at 6. This is an erroneous premise. First, many of the cases upon which Petitioner herein relies are the very cases relied upon by the petitioner when this Court denied certiorari in *McKinney v. Pate,* ___ U.S. ___, 115 S.Ct. 898, 899, 130 L.Ed.2d 783 (1995).

Second, it is not surprising that federal circuits have not uniformly treated the issue because the property right in employment is created by state law. This requires the federal circuits to decide the issue in the conjunction with the applicable state law and the rights, if any, created by the particular state law or laws.

State law and remedies governed Petitioner in his challenge to the layoff. That is, Petitioner was given notice of the layoff as required by the City of Miami Civil Service rules. He took advantage of the hearing procedure afforded by the

Civil Service rules to challenge the layoff. Although the Civil Service Board agreed with Petitioner and made its findings and recommendations accordingly, the City Manager rejected them because he disagreed that any of the Civil Service rules had been violated. Thereafter, Petitioner filed an action to review the City Manager's rejection in state court, where he prevailed and was made whole as a result of the wrongful layoff.

Given the diversity of state laws that confer (or fail to confer) a property interest in employment, the Court's analytical framework militates against according substantive due process protection to state-created employment property rights uniformly among the circuits. Under these circumstances, this Court should adhere to its historical course of judicial restraint and caution in regard to the expansion of substantive due process as suggested by Petitioner.

Interestingly, one of the cases upon which Petitioner relies for inter-circuit conflict, *Newman v. Burgin*, 844 F. 2d 19 (1st Cir. 1989), appeal after remand, *Newman v. Burgin*, 930 F. 2d 955 (1st Cir. 1991), actually supports the summary reversal entered below. In the appeal after remand, the tenured professor argued she was denied substantive due process because the university did not follow ordinary procedures for personnel actions in a manual known as the "Red Book." The First Circuit rejected this contention and found that

> [t]he Due Process Clause ... does not require the University to follow any specific set of detailed procedures as long as the procedures the University actually follows are basically fair ones ... Whether the University was, or was not, supposed to

> apply its "Red Book" procedures in this case is a matter of University rule or policy, not of federal constitutional law.

930 F. 2d at 955 (emphasis added). Thus, the First Circuit affirmed the summary judgment entered for the university defendants. Likewise in the instant case, whether or not Respondent followed its Civil Service rules is a matter of state rule or policy, not federal constitutional law. The state court found in Petitioner's favor in this regard and ordered the appropriate relief. Federal constitutional law should not now be applied so as to afford Petitioner a windfall after he has availed himself of procedures and remedies afforded under state law.

Finally, Petitioner urges the Court to review the case because there is an "[i]mportant question of federal law which should be settled by this Court." Petition at 11. In support thereof, Petitioner asserts that "[b]ecause of the large number of public employees in this country, this is an issue that will arise time and again, and will present the lower courts with a question of law on which there are conflicting precedents...." Petition at 11. Petitioner is mistaken. It is neither wise nor feasible for the Court to etch a rule of law, to be applied uniformly throughout this country, which affords substantive due process protection where the underlying property right is merely a creature of state law.

This Court is requested to decline Petitioner's invitation to expand substantive due process jurisprudence into this unchartered and open-ended area. Rather, Respondent requests this Court to follow its own astute recognition that

> [t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh

> fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error ... The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 426 U.S. 341, 349-50 (1976).

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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